

# THE CONFLICT OF LAWS OF GERMANY

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## HISTORY AND SOURCES

In Germany the rules of the conflict of laws have generally been regarded as a part of the municipal law.<sup>1</sup> It was natural, therefore, that with the unification of the German law through the Civil Code, in effect since January 1, 1900, the rules relating to the conflict of laws prevailing in the different states and territories constituting the German Empire should have been codified. Dr. Gebhard, the author of the General Part of the first draft of the German Civil Code, submitted to the First Commission general rules relating to the conflict of laws. The Second Commission decided to incorporate them into the code as the Sixth Book. The Federal Council eliminated some of the rules submitted,<sup>2</sup> completely revamped the rest, so as to limit their operation to German subjects or to German territory,

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### ABBREVIATIONS USED IN THIS ARTICLE:

BOLG—Sammlung von Entscheidungen des Bayrischen Obersten Landesgerichts in Zivilsachen

Bayr. OLG—Bayrisches Oberstes Landesgericht

Gruchot—Beiträge zur Erläuterung des deutschen Rechts, begründet von Gruchot

Hans. OLG—Hanseatisches Oberlandesgericht

HGZ—Hanseatische Gerichtszeitung, Beiblatt, zivilrechtliche Fälle

JW—Juristische Wochenschrift, Organ des deutschen Anwaltvereins

KG—Kammergericht

LG—Landgericht

Leipz. Z.—Leipziger Zeitschrift für deutsches Recht

Niemeyer—Zeitschrift für Internationales Recht

OAG—Oberappellationsgericht.

OLG—Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts

Recht—Das Recht, Rundschau für den deutschen Juristenstand

RG—Reichsgericht; also Entscheidungen des Reichsgerichts in Zivilsachen

RGBl—Reichsgesetzblatt

ROHG—Reichsoberhandelsgericht; also Entscheidungen des Reichsoberhandelsgerichts.

Rhein. Z.—Rheinische Zeitschrift für Zivil- und Prozessrecht

SA—Seuffert's Archiv für Entscheidungen der obersten Gerichte

Sächs. Ann.—Annalen des Sächsischen Oberlandesgerichts zu Dresden

Sächs. Arch.—Sächsisches Archiv für Rechtspflege

<sup>1</sup> MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH (1899) 255, n.

<sup>2</sup> For example, the rules relating to property and obligations.

and transferred them to the Introductory Law of the German Civil Code, where they now appear as Articles 7 to 31.

As to certain matters the states of the German Empire have retained the power of legislation,<sup>3</sup> and with respect to these, they are authorized to lay down rules of the conflict of laws. As regards such subjects the old local rules of the conflict of laws still govern, unless they have been modified since 1900. In the absence of local rules of the conflict of laws those of the Civil Code are applied.<sup>4</sup>

All rules relating to the conflict of laws are not to be found in the Civil Code, for some are contained in other imperial legislation, for example, in the Bills of Exchange Act (Articles 84 to 86), in the Code of Civil Procedure, and in the law relating to voluntary jurisdiction.

Before the World War Germany had concluded many treaties containing rules of the conflict of laws, but most of these have either expired or have been abrogated. A number of treaties of this kind have been entered into by Germany in recent years, of which the most important is the one with Russia of October 12, 1925.<sup>5</sup>

Germany became a party to the Hague Conventions relating to Private International Law of June 12, 1902 (Marriage, Divorce and Guardianship of Minors), and of July 17, 1905 (Effect of Marriage upon the Rights and Duties of Spouses, and Guardianship of Insane Persons, etc.), and of the Hague Convention relating to Procedure of November 14, 1896, with the additional protocol of May 22, 1897, which convention is now replaced by the one of July 17, 1905. The Convention last mentioned and the one relating to Guardianship of Minors are in force today between Germany and many of the other continental countries. The other Conventions have a more restricted application.

In the following discussion of the subject only the general rules of the conflict of laws will be set forth, without reference to their modification by treaty provisions.

#### NATIONALITY

The Civil Code has substituted the national law for that of domicil, which formerly prevailed in Germany, in the regulation of the conflict of laws, for example, as regards capacity, family relations, and succession. The rules governing the acquisition and loss of the German nationality are contained today in the

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<sup>3</sup> See INTRODUCTORY LAW arts. 59 et seq.

<sup>4</sup> RG, Sept. 25, 1913, HGZ 1914, 233, 235; KG, Aug. 9, 1906, 14 OLG 261.

<sup>5</sup> RGBl 1926 II, 1.

law of July 22, 1913.<sup>6</sup> According to this law the German nationality is acquired ordinarily through citizenship in a German state. Citizenship in a German state is acquired through birth, a legitimate child taking the citizenship of its father, and an illegitimate child that of its mother.<sup>7</sup> An illegitimate child acquires the nationality of its father if the legitimation is valid according to German law.<sup>8</sup>

A foreign woman marrying a person possessing the German nationality acquires his nationality.<sup>9</sup> She retains the German nationality after her husband's death.<sup>10</sup> The German nationality which she acquires through marrying a German does not pass to her children of a former marriage.<sup>11</sup>

The acquisition of the German nationality through naturalization extends, in the absence of a reservation to the contrary in the certificate of naturalization, to the wife and those children with respect to whom the party naturalized has the power of legal representation by virtue of the parental power. Excepted are daughters that are married or have been married.<sup>12</sup>

The German nationality is lost by (1) expatriation; (2) acquisition of a foreign nationality; (3) governmental pronouncement; (4) in the case of an illegitimate child, through legitimation by a foreigner which is valid according to German law; (5) in the case of a woman, through marriage to a foreigner.<sup>13</sup>

Acquisition of a foreign nationality will cause a loss of the German nationality provided certain conditions exist, to wit: The party must have neither his domicile nor residence in Germany. The acquisition of the foreign nationality must have been voluntary, that is, upon personal request, or, in the case of a wife or minor, upon the application of the husband or legal representative. The wife or minor lose their German nationality only if the provisions of Sections 18 and 19 of the law relating to expatriation have been satisfied.

In the light of the above provisions, it is evident that a person may have more than one nationality, or that he may be without any nationality. If he has a double nationality, one of which is the German, his legal rights depending upon nationality will be

<sup>6</sup> See CAHN, REICHS UND STAATSANGEHÖRIGKEITSGESETZ OF JULY 22, 1913 (4th ed. 1914); KELLER AND TRAUTMANN, KOMMENTAR ZUM REICHS UND STAATSANGEHÖRIGKEITSGESETZ OF JULY 22, 1913 (1914).

<sup>7</sup> LAW CONCERNING NATIONALITY § 4.

<sup>8</sup> *Ibid.* § 5.

<sup>9</sup> *Ibid.* § 6.

<sup>10</sup> CAHN, *op. cit. supra* note 6, at 38; KELLER AND TRAUTMANN, *op. cit. supra* note 6, at 84.

<sup>11</sup> CAHN, *op. cit. supra* note 6, at 40; KELLER AND TRAUTMANN, *op. cit. supra* note 6, at 84.

<sup>12</sup> LAW CONCERNING NATIONALITY § 16.

<sup>13</sup> *Ibid.* § 17.

determined by the German courts with reference to German law.<sup>14</sup> What they will do in case he is a subject of two foreign countries is not clear.<sup>15</sup> As regards persons without any nationality, Article 29 of the Introductory Law provides that if such person possessed a former nationality, the law of such nationality shall apply, but if he never possessed any nationality, resort shall be had to the law of his domicil at the time of the transaction in question, and, in the absence of a domicil, to the law of his place of residence or sojourn.

The application of the law of nationality creates difficulty with respect to countries whose law is not uniform. If the country provides by national legislation that the law of particular subdivisions shall control, as for example, in Switzerland, where the Swiss law of June 25, 1891, subjects Swiss subjects domiciled abroad in matters of inheritance to the home cantonal law if, according to the *lex domicilii*, they are not subject to the foreign law, such direction will be followed.<sup>16</sup> With respect to citizens of the United States reference will be had to the law of the party's domicil in the United States; or, if such domicil was lost, to the law of the state in which the party was last domiciled in the United States, before taking up his domicil abroad.

#### DOMICIL

Under the former law of Germany the domicil of a party played as prominent a part in the conflict of laws of the German states as it does today in Anglo-American countries. Although the Civil Code has abandoned the law of domicil in most of these matters, its importance remains undiminished with respect to the jurisdiction of courts. The general rules relating to domicil may be found in the Civil Code.

Section 7 of the Civil Code reads:

"A person who resides habitually in a place establishes his domicil in that place.

"Domicil may exist simultaneously in several places.

"Domicil is lost if, with the intention of abandoning it, residence is discontinued."

This section reveals most clearly the subordinate place now oc-

<sup>14</sup> RG, Jan. 24, 1908, 18 Niemeyer 535, 539. With respect to a person of high nobility, possessing the Austrian and German nationalities, it has been held that it would conform to the Introductory Law of the Civil Code and convenience if his personal estate were governed by the law of his domicil and his real estate by the law of the situs. Bayr. OLG, June 19, 1913, 14 BOLG 353.

<sup>15</sup> 2 SÖRGEL, BÜRGERLICHES GESETZBUCH NEBST EINFÜHRUNGSGESETZ (3d ed. 1926) 1979.

<sup>16</sup> Bayr. OLG, Oct. 12, 1917, 35 OLG 380.

cupied by domicile in the German system of the conflict of laws. In a country like the United States, where the law of domicile may determine personal rights, it is necessary that the law should assign to each individual a domicile and that it should allow him to have but one. In the United States a domicile of choice clings to a person until a new one is acquired; in England the domicile of origin reverts in such case. In Germany a person is without a domicile upon discontinuance of his residence at his last domicile with intention of abandoning the domicile there, until a new domicile is acquired. Residence is taken as a substitute for domicile in cases where domicile would control and the existence of a domicile cannot be proved.<sup>17</sup>

The notion that in German law a person may have two domiciles does not lead to any particular difficulty in the matter of jurisdiction of courts, for in those cases jurisdiction exists at either domicile.<sup>18</sup> But in exceptional situations, where substantive rights are to be determined with reference to domicile,<sup>19</sup> a grave problem may arise as to whether resort shall be had to the domicile first established, or to the one last established, or perhaps even to the one that has the closest connection with the problem in hand.<sup>20</sup> If one of the several domiciles is in Germany, the German law may be preferred.<sup>21</sup>

The rules of the Civil Code relating to domicile are held generally applicable to domicile as a basis of jurisdiction. Domicile for the purpose of voting, for the purpose of taxation and for the support of paupers is regulated by statutes relating to these subjects which may attach to it a somewhat different meaning than that given in the Civil Code.

In Anglo-American law the law of the forum will determine what is meant by domicile.<sup>22</sup> In a system like the German, in which domicile plays its chief role in matters of procedure, this may not be so. It seems to be admitted that the question whether a foreigner has acquired a domicile in Germany is to be determined with reference to the German notion of domicile.<sup>23</sup> But the law is not so certain with respect to the acquisition of a domicile in a foreign country.<sup>24</sup> The view that the law of the

<sup>17</sup> INTRODUCTORY LAW, art. 29.

<sup>18</sup> For example, if one of the domiciles is in a foreign country. RG, Apr. 5, 1921, 102 RG 82.

<sup>19</sup> See INTRODUCTORY LAW, art. 29.

<sup>20</sup> See 2 SÖRGEL, *op. cit. supra* note 15, at 1979; Löwenfeld, in 1 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH UND DEM EINFÜHRUNGSGESETZE (9th ed. 1925) 90; WALKER, INTERNATIONALES PRIVATRECHT (4th ed. 1926) 88.

<sup>21</sup> WALKER, *op. cit. supra* note 20, at 87-88.

<sup>22</sup> CONFLICT OF LAWS RESTATEMENT No. 1 (Am. L. Inst. 1925) § 11.

<sup>23</sup> OLG Braunschweig, Dec. 21, 1909, 20 OLG 285.

<sup>24</sup> The cases are inconclusive. See RG, Oct. 25, 1883, 28 Gruchot 889;

state in which the domicile is claimed should control has strong support among the authors.<sup>25</sup> It has been contended also that the definition adopted by the national law of the parties should control, so that a German would acquire a domicile in Russia in accordance with the German notion of domicile and an Englishman according to the English notion.<sup>26</sup>

"Habitual" residence, required by Section 7 of the Civil Code for the acquisition of domicile, means, of course, something more than temporary residence.<sup>27</sup> On the other hand, it does not require an intention to settle down in a place permanently. An intention to stay there for an indefinite period of time suffices, though removal is contemplated in case of a change of circumstances.<sup>28</sup> It is often said that a domicile is acquired by a person only if the new place of abode has become the center of his affairs.<sup>29</sup>

Persons incapable of disposing, or of limited dispositive capacity, may not establish or abandon a domicile without the consent of their legal representative.<sup>30</sup> This rule applies to minors, to persons in a condition of morbid disturbance of the mental activities incompatible with a free determination of the will, so far as the condition is not temporary in its nature, and to persons interdicted on account of insanity, feeble-mindedness, prodigality, or habitual drunkenness.<sup>31</sup>

In German law the legal representative of a person may supplement the latter's limited capacity, and this applies in the matter of domicile. A person belonging to the classes above enumerated, having sufficient intelligence to choose a place as his habitual residence, will acquire a domicile there as the result of his own volition, if it is done with the consent of his legal representative. With the consent of his parents, a minor may acquire, in this manner, a separate domicile.<sup>32</sup>

In our law, prisoners cannot acquire a domicile in the place of imprisonment, for the acquisition of a domicile of choice presupposes freedom on the part of the individual to choose his place

Nov. 19, 1894, 34 RG 392; Apr. 5, 1921, 102 RG 82; OLG Braunschweig, Dec. 21, 1909, 20 OLG 285.

<sup>25</sup> 2 SÖRCEL, *op. cit. supra* note 15, at 1979; see also RG, Nov. 18, 1894, 34 RG 392.

<sup>26</sup> 1 STEIN-JONAS, *DIE ZIVILPROZESSORDNUNG FÜR DAS DEUTSCHE REICH* (14th ed. 1928) 84; 1 FRANKENSTEIN, *INTERNATIONALES PRIVATRECHT (GRENZRECHT)* (1926) 124-125.

<sup>27</sup> Bayr. OLG, Feb. 19, 1906, 13 OLG 306; OLG Hamburg, June 25, 1909, 19 OLG 130.

<sup>28</sup> Bayr. OLG, Feb. 19, 1904, 10 OLG 56.

<sup>29</sup> RG, Sept. 23, 1916, *Recht* 1916, No. 2053.

<sup>30</sup> CIVIL CODE, art. 8.

<sup>31</sup> See *ibid.* § 104; RG, June 20, 1912, *Recht* 1912, No. 2794; Bayr. OLG, May 3, 1910, *Recht* 1910, No. 1902.

<sup>32</sup> Löwenfeld, in 1 STAUDINGER, *op. cit. supra* note 20, at 92.

of residence.<sup>33</sup> According to the common law formerly prevailing in Germany, a prisoner acquired a compulsory domicil at the place of imprisonment. This was changed by legislation in some of the German states prior to the adoption of the Civil Code, and this modern point of view has been followed also by the Civil Code. The American rule that a prisoner can under no circumstances acquire a domicil at the place of imprisonment was deemed to go too far, however, and it was concluded that prisoners should be subject to the ordinary rules.<sup>34</sup> Their former domicil will continue therefore until the intent to abandon it is manifest, in which event they will be without domicil, save in the exceptional case where a new domicil has been acquired at the place of imprisonment.<sup>35</sup> With the authorization of a husband, who is a prisoner, a wife may acquire a new domicil for him, and such authorization may be given by implication.<sup>36</sup>

Military persons by profession have their legal domicil in the place where they are stationed.<sup>37</sup> They may have elsewhere a domicil of choice.<sup>38</sup>

The domicil of a married woman follows that of her husband.<sup>39</sup> This is so, even though husband and wife live separately, and the wife is justified in not living with her husband.<sup>40</sup> If the husband has several domicils the wife will have them likewise. The husband's imprisonment, it seems, does not enable the wife to establish a domicil of her own.

By express provision of the Code a wife may establish a domicil of her own in case the husband has no domicil, or the husband takes up a domicil in a foreign country to which the wife does not follow and is not bound to follow.<sup>41</sup> A wife may acquire a separate domicil also in case of judicial separation.<sup>42</sup>

The domicil of a legitimate child follows that of the father.<sup>43</sup>

<sup>33</sup> CONFLICT OF LAWS RESTATEMENT No. 1 (Am. L. Inst. 1925) § 23.

<sup>34</sup> 1 MUGDAN, *op. cit. supra* note 1, at 391-392.

<sup>35</sup> RG, Oct. 23, 1884, 40 SA 348; Bayr. OLG, Dec. 7, 1900, 56 SA 433. As regards jurisdiction, § 21, par. 1, of the Code of Civil Procedure may apply, according to which a person may be sued at his place of business with respect to controversies arising out of transactions affecting such business and concluded at such place.

<sup>36</sup> RG, July 3, 1913, 69 SA 1.

<sup>37</sup> CIVIL CODE art. 9, par. 1. The provision does not apply to persons who cannot establish a separate domicil without the consent of their legal representative. *Ibid.* par. 2.

<sup>38</sup> 1 SÖRGEL, *op. cit. supra* note 15, at 8.

<sup>39</sup> CIVIL CODE art. 10.

<sup>40</sup> RG, Jan. 5, 1905, 59 RG 337.

<sup>41</sup> CIVIL CODE art. 10.

<sup>42</sup> RG, Jan. 5, 1905, 59 RG 337; OLG Munich, May 7, 1914, 29 OLG 300.

<sup>43</sup> Although a child's legitimacy is attacked in a legal proceeding brought to test its status, the child will be deemed domiciled with its father until its illegitimacy is established by the decree. OLG Hamburg, May 11, 1914, 31 OLG 9.

This rule holds true in case of divorce where, the father being solely at fault, the care of the child's person belongs to the mother.<sup>44</sup> Such care gives power to the mother to determine the residence of a child but not its domicil.<sup>45</sup> The child's domicil continues to follow that of the father *ipso facto*,<sup>46</sup> although the child has never lived with the father at his domicil.<sup>47</sup> By virtue of his parental power the father may give to the child a separate domicil either by his own act and volition<sup>48</sup> or by giving his consent to the child's choice of domicil.<sup>49</sup> The child's domicil follows that of the father although he has abandoned his wife and child and has established a new domicil.<sup>50</sup> Where the father abandons his domicil without acquiring another, the child's domicil is not lost, but remains where it was, as upon the father's death, until it is changed with the consent of or by the child's legal representative.<sup>51</sup>

In the exceptional cases in which during the lifetime of the husband the wife is entitled to exercise the parental power with respect to her minor children,<sup>52</sup> she can also change their domicil, or authorize such a change by the minor.<sup>53</sup> On the father's death, his parental powers pass to the mother of the children, in consequence of which she can determine their domicil.<sup>54</sup> It enables her also to give to the child a domicil separate from her own, but the child's domicil does not follow that of the mother *ipso facto*, but remains where it was at the father's death, which domicil may be retained notwithstanding the fact that the child lived with the mother for years.<sup>55</sup> Upon remarriage the mother loses her parental powers over the minor children, so that their domicil will not be changed by such marriage, although they continue to live with her.<sup>56</sup> The child's domicil will remain where

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<sup>44</sup> See CIVIL CODE § 1635; OLG Colmar, Oct. 3, 1906, Recht 1906, No. 2980; OLG Dresden, June 11, 1910, 66 SA 177.

<sup>45</sup> Nor does she have such power if the father has agreed to let her have the custody of the children. KG, May 28, 1909, Recht 1911, No. 2.

<sup>46</sup> OLG Dresden, July 11, 1910, 21 OLG 260; Bayr. OLG, June 9, 1916, 35 OLG 288; Feb. 4, 1920, Recht 1920, No. 1129.

<sup>47</sup> Bayr. OLG, Feb. 15, 1918, Recht 1918, No. 659.

<sup>48</sup> OAG Rostock, Jan. 12, 1874, 31 SA 14.

<sup>49</sup> The father's right to represent the child continues, notwithstanding the fact that he was declared solely at fault in the divorce proceeding. See CIVIL CODE § 1635, par. 2. He may be deprived of his parental power, however, by a decree of a Court of Guardianship. See *ibid.* 1630, par. 2.

<sup>50</sup> OLG Dresden, March 1, 1905, 12 OLG 1.

<sup>51</sup> OLG Stuttgart, Feb. 6, 1903, 10 OLG 56; Bayr. OLG, Nov. 16, 1908, 9 BOLG 615.

<sup>52</sup> See CIVIL CODE § 1680.

<sup>53</sup> Bayr. OLG May 7, 1909, 10 BOLG 215.

<sup>54</sup> Bayr. OLG, Sept. 6, 1900, 1 BOLG 412.

<sup>55</sup> OLG Dresden, Oct. 2, 1907, 29 Sächs. Ann. 46; Bayr. OLG, March 9, 1914, 15 BOLG 152.

<sup>56</sup> Bayr. OLG, June 25, 1907, 8 BOLG 299.

it was before the mother's second marriage and can be changed only by or with the consent of its legal guardian.

On the death of both parents the child's domicil remains where it was at the death of the parent last living, until it is changed by or with the consent of its guardian.

An illegitimate child takes at its birth the domicil of its mother<sup>57</sup> and it changes *ipso facto* with a change in the mother's domicil,<sup>58</sup> even after the mother's marriage.<sup>59</sup>

A legitimated child takes the domicil of the father and an adopted child the domicil of the adoptor.<sup>60</sup> Legitimation or adoption taking place after majority does not affect the domicil of the legitimated or adopted person.<sup>61</sup>

A person who is of age cannot acquire a domicil if he is insane. He will retain his former domicil until it is changed by his legal representative. If he is pronounced incurably insane and placed by his guardian permanently in an institution, his domicil has been held changed to the place where the institution is located.<sup>62</sup> By some courts, however, it is held that the insane person will retain his old domicil in the absence of proof that his guardian meant to constitute the place in which the institution is located the center of the insane party's affairs.<sup>63</sup> The view has been expressed that this is impossible unless the guardian himself removes to such place.<sup>64</sup>

#### RENOVI

The question whether the rules of the conflict of laws of a country are to be understood as referring to the foreign law inclusive or exclusive of its rules of the conflict of laws has given rise to much discussion. Dr. Gebhard, the draftsman of the provisions of the conflict of laws in the German Civil Code, regarded the application of the foreign law in its totality as useful, though difficult to justify in theory, whenever the German law calls for the application of the national law, and the foreign national law refers back to German law. The alleged practical advantages according to him were: (1) it would reduce the

<sup>57</sup> CIVIL CODE § 11.

<sup>58</sup> Löwenfeld, in 1 STAUDINGER, *op. cit. supra* note 20, at 101; Bayr. OLG, Feb. 20, 2 BOLG 109.

<sup>59</sup> Bayr. OLG, Apr. 10, 1906, 7 BOLG 217; Feb. 13, 1911, Recht 1911, No. 1089.

<sup>60</sup> CIVIL CODE § 11, par. 1.

<sup>61</sup> *Ibid.* par 2.

<sup>62</sup> OLG Colmar, July 29, 1908, 17 OLG 359; OLG Rostock, June 16, 1915, 33 OLG 19; see also OLG Oldenburg, March 1, 1899, 55 SA 134.

<sup>63</sup> OLG Karlsruhe, Dec. 6, 1900, 2 OLG 445; Bayr. OLG, Dec. 31, 1901, Recht 1902, No. 245.

<sup>64</sup> Joseph, *Vertretungsbefugnis des Vormundes* (1916) 114 ARCHIV FÜR CIVILISTISCHE PRAXIS 406, 410.

number of cases in which different conclusions would be reached by reason of the fact that some courts apply the national law and others the law of domicile; and (2) it would enable the German courts to apply German law when the foreign courts would do so. He proposed to allow the *renvoi*, therefore, in the case of capacity, marriage, personal relations between husband and wife, divorce, matrimonial property, gifts between husband and wife, legitimacy, legitimation and adoption, rights of parents in the property of their children, guardianship and succession.<sup>65</sup> The Commissions, to whom Dr. Gebhard's drafts were submitted, were opposed to the acceptance of the *renvoi* doctrine, but sanctioned it with respect to marriage and divorce. The Federal Council restored the principle of *renvoi* and gave it its present form as Article 27 of the Introductory Law. This article reads as follows:

"If German law is declared to be applicable by the law of a foreign country which law is declared to be applicable by article 7, paragraph 1, article 13, paragraph 1, article 15, paragraph 2, article 17, paragraph 1, and article 25, the German law applies."

Article 7, paragraph 1, relates to capacity; article 13, paragraph 1, to marriage;<sup>66</sup> article 15, paragraph 2, to matrimonial property;<sup>67</sup> article 17, paragraph 1, to divorce,<sup>68</sup> article 25 to succession.<sup>69</sup>

These are all instances in which the national law is to be applied according to the German Civil Code. The question thus arises whether it was the intention of the Civil Code to limit the *renvoi* doctrine to the cases enumerated, or whether it is applicable also to other situations. It seems clear that it applies to other situations where the national law is to be applied, for example, to the personal relations between husband and wife (Introductory Law, article 14),<sup>70</sup> to legitimacy (article 18), to the legal relations between parent and child (articles 19 and 20),<sup>71</sup> and to legitimation and adoption (article 22). These sections were not included in Article 27 because the wording of

<sup>65</sup> See WALKER, *op. cit. supra* note 20, at 230, n. 9.

<sup>66</sup> See OLG Dresden, Jan. 15, 1912, 26 OLG 211.

<sup>67</sup> See OLG Colmar, Aug. 24, 1911, 4 Rhein. Z. 295.

<sup>68</sup> See RG, Jan. 7, 1907, JW 1907, 127; KG, Sept. 20, 1901, 3 OLG 365; OLG Dresden, March 13, 1911, Sächs. Arch. 1912, 272.

<sup>69</sup> See RG, Nov. 27, 1911, 78 RG 48; KG, Dec. 7, 1916, 34 OLG 310; March 22, 1922, JW 1922, 1130; OLG Colmar, Nov. 30, 1914, 32 OLG 88.

<sup>70</sup> RG, Feb. 15, 1906, 62 RG 400; KG, Sept. 20, 1901, 3 OLG 365; OLG Hamburg, Oct. 16, 1909, HGZ 1910, 51; see also RG, Oct. 15, 1907, JW 1907, 755.

<sup>71</sup> OLG Dresden, Apr. 4, 1910, Sächs. Arch. 1910, 373, affirmed in RG, Dec. 29, 1910, JW 1911, 208; KG, Apr. 17, 1914, 32 OLG 31; Bayr. OLG, March 13, 1912, 26 OLG 257; Apr. 22, 1922, 42 OLG 126.

these sections had specific reference to the application of German, instead of foreign, law. By way of extended interpretation, these sections are held, however, to apply the national law also to foreigners, and there is no valid reason why the renvoi doctrine should not be accepted in these instances, where the foreign law refers back to German law, and so the courts hold.

The question has been raised also as to whether the cases in which the renvoi is sanctioned by virtue of Article 27 of the Introductory Law were not to be regarded merely as instances of a general principle which would admit of the application of the foreign law in its totality, inclusive of the conflict of laws, where the national law does not refer back to German law but to the law of some other state, and in cases where under the German rules of the conflict of laws some other law than the national law controls, and the foreign law refers back to German law or to the law of some other state or country. Whether the renvoi doctrine will be extended in these directions is not yet clearly apparent. In one case the Imperial Court tacitly applied the renvoi doctrine to the subject of contracts.<sup>72</sup> In another, a case involving intestate succession, the decedent being a Belgian subject who was domiciled in Russia, and leaving real and personal property in Russia, it held that the Belgian law was to be applied as the Belgian courts would do, although it would lead, at least as to the real property in Russia, to the application of Russian law.<sup>73</sup>

#### THE QUALIFICATION OF LEGAL TRANSACTIONS

According to Frankenstein, the latest German authority on the subject of the conflict of laws, there are two primary points of contact in the conflict of laws, the national law in the case of personal obligations and the law of the situs as regards property. These should control in all respects, in whichever country action might be brought, subject only to the rules of the public policy of the forum. From this point of view, both the renvoi doctrine and that of the qualification of legal transactions would disappear as special problems, for the law of the primary points of contact would determine these matters, as it does all others.<sup>74</sup>

As appears from the discussion above, the German courts agree with Frankenstein in the matter of renvoi to a limited extent, namely, where it involves conflicts between the law of nationality and that of domicile and the foreign rule of the conflict of laws refers the case back to German law. As regards the

<sup>72</sup> RG, June 25, 1924, JW 1925, 249, and see note by Melchior, JW 1925, 1571, 1575. A dictum in RG, Feb. 15, 1912, 78 RG 235, 237, is also to the effect that renvoi is a *general* principle in German law.

<sup>73</sup> RG, Nov. 8, 1917, 91 RG 139; see also RG, Nov. 30, 1906, 64 RG 389.

<sup>74</sup> 1 FRANKENSTEIN, *op. cit. supra* note 26, at 53.

qualification of legal transactions, there are no decisions supporting the general point of view mentioned. So far as the law of the situs controls, it will doubtless determine whether the property in question is to be regarded as movable or immovable property. In cases other than these, the German courts apply their own rules. A number of cases of this sort have arisen in connection with the jurisdiction of the German courts, depending upon domicile, upon the situs of immovable property, or upon the place where a contract was to be performed, or an unlawful act was committed. In all of these the German law determines what is meant by "domicil,"<sup>75</sup> or an "immovable,"<sup>76</sup> or by the "place of performance," or the *locus delicti*.<sup>77</sup>

The law of the forum has been applied also as regards other questions involving the qualification of legal transactions. Thus it is well established that the place of performance, the law of which governs contractual obligations in Germany, is to be ascertained with reference to German law.<sup>78</sup>

Statutes of limitations are regarded by German law as affecting the substantive rights of the parties. This view will be applied although the contract has been made and is to be performed in a country which regards the statute of limitations as a procedural device. With respect to such a contract, the foreign statute of limitations will control.<sup>79</sup> Frankenstein holds this point of view to be erroneous, his contention being that in view of the fact that the law constituting the primary point of contact regards (qualifies) its statute of limitations as a procedural one, each court in which the suit arises should accept this qualification and apply the statute of the forum.<sup>80</sup>

#### PUBLIC POLICY

Article 30 of the Introductory Law to the Civil Code provides that no effect shall be given to a foreign rule of law (1) if its application in Germany would be *contra bonos mores*; or (2) if its application would be contrary to the purposes of a German law. It is evident that no definition of these terms will help to elucidate them, and that recourse must be had to the decisions of the courts. Under what circumstances the German courts decline to give effect to foreign rules of law on the grounds above

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<sup>75</sup> RG, Nov. 5, 1901, JW 1901, 833; Dec. 9, 1907, 67 RG 191.

<sup>76</sup> RG, Feb. 27, 1915, 86 RG 272, 277.

<sup>77</sup> RG, Nov. 14, 1912, 68 SA 163.

<sup>78</sup> RG, March 11, 1919, 95 RG 164, 166.

<sup>79</sup> RG, May 8, 1880, 2 RG 13; Jan. 4, 1882, 7 RG 21; Nov. 21, 1910, JW 1911, 148.

<sup>80</sup> I FRANKENSTEIN, *op. cit. supra* note 26, at 276.

mentioned will be shown in the discussion of the special topics below.<sup>81</sup>

#### JURISDICTION OF COURTS

The jurisdiction of German courts is defined in the Code of Civil Procedure and in special laws. In this place only the general rules will be given. Some of the special rules will be indicated below when the particular topics to which they relate are considered. The rules laid down for the jurisdiction of the German courts will be applied also to foreign judgments when their enforcement in Germany is sought.

The German rules differ profoundly from those of Anglo-American law. They are alike, however, in not discriminating on principle against foreigners.

##### A. *General Forum*

Jurisdiction based on personal service is not recognized at all in Germany. German law starts with the general proposition that a person may be sued at his domicile with respect to all actions.<sup>82</sup> There he has his general forum and a plaintiff must go there, unless in the particular case he is permitted to sue elsewhere. In certain cases the action must be brought at a particular place, which constitutes an exclusive forum.

If the defendant has his domicile in Germany at the time of the commencement of the suit, he must be notified in accordance with Sections 166 and following of the Code of Civil Procedure, and if he is in a foreign country, in accordance with Sections 199 and following of the Code of Civil Procedure.<sup>83</sup>

The meaning of domicile is ascertained with reference to the ordinary rules laid down in Sections 7 to 11 of the Civil Code.

If a person has no domicile either in Germany or elsewhere a general forum exists with respect to him, where he may be sued with respect to all actions except those for which a special and exclusive forum has been provided, at his place of sojourn in Germany. It is sufficient in such cases that the defendant was in Germany at the commencement of the suit.<sup>84</sup>

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<sup>81</sup> Regarding the second class of cases the Imperial Court has said that the difference in the underlying political and social views must be such that the application of the foreign law would directly undermine the foundations of the German political or social life. RG, Dec. 19, 1922, 106 RG 82. From this definition it might be inferred that few cases would be held to fall within this class, but that is not true in fact.

<sup>82</sup> CODE OF CIVIL PROCEDURE § 13.

<sup>83</sup> If the defendant is in the United States he will be notified through the German consulate. As between many countries the notification is regulated by the provisions contained in the International Convention of the Hague Relating to Procedure, of July 17, 1905. See 1 STEIN-JONAS, *op. cit. supra* note 26, at 565.

<sup>84</sup> See CODE OF CIVIL PROCEDURE § 16; RG, Sept. 26, 1892, 48 SA 211.

Such a general forum exists likewise at the defendant's last domicile in Germany, provided he has no domicile anywhere at the time of the suit, and he was not sojourning in Germany at the time, or if he was, the plaintiff was ignorant of it.<sup>85</sup> The plaintiff will meet the burden of proof by showing that in the exercise of reasonable diligence he could not ascertain that the defendant had a domicile either in Germany or in any other country, or that he was sojourning in Germany at the time.<sup>86</sup> The defendant may then overcome the presumption of jurisdiction by showing that he possessed a domicile, either in Germany or in some other country, at the time of the suit.<sup>87</sup>

With respect to corporations and partnerships, the general forum is at their "seat,"<sup>88</sup> which is often likened to the domicile of a natural person. In the case of commercial partnerships, the "seat" is necessarily at the place of administration.<sup>89</sup> The seat of a corporation is the place indicated as such in the articles of incorporation. If not so specified, it is the place from which the management of the corporation proceeds.<sup>90</sup> Concurrently with this jurisdiction existing at its "seat," general jurisdiction with respect to corporations exists at such other place as is specified in their articles of incorporation, or by the law of the state in which such corporations do business.<sup>91</sup>

### B. *Special Fora*

In addition to the general forum described above, the German Code of Civil Procedure contains a large number of special fora.

(1) *Forum at Defendant's Residence.* Persons whose occupation or employment causes them in the nature of things to remain in Germany for some length of time, or in some particular state or territory of the German Empire, for example, as servants, workmen, or students, may be sued at the place of such residence with respect to all pecuniary claims.<sup>92</sup> This forum is concurrent with the general forum at the defendant's domicile.<sup>93</sup>

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<sup>85</sup> CODE OF CIVIL PROCEDURE § 16.

<sup>86</sup> RG, Jan. 15, 1891, 27 RG 400; Apr. 6, 1900, JW 1900, 410; KG, Feb. 19, 1906, 15 OLG 54.

<sup>87</sup> OLG Hamburg, July 8, 1909, 19 OLG 131.

<sup>88</sup> CODE OF CIVIL PROCEDURE § 17.

<sup>89</sup> They are not privileged to choose a seat different from the place of their central administration. KG, Nov. 29, 1910, 22 OLG 2.

<sup>90</sup> CODE OF CIVIL PROCEDURE § 17; RG, March 31, 1903, 54 RG 207; Oct. 27, 1904 59 RG 106.

<sup>91</sup> CODE OF CIVIL PROCEDURE § 17, par. 3; RG, Oct. 27, 1904, 59 RG 106.

<sup>92</sup> CODE OF CIVIL PROCEDURE § 20.

<sup>93</sup> Personal presence on the part of the defendant at the time of the commencement of the suit is not necessary. RG, July 8, 1892, 30 RG 326, 328.

(2) *Forum at Business Place or Branch Establishment.* A person domiciled in a foreign country who has a business establishment in Germany may be sued at such place with respect to all causes of action arising out of such business.<sup>94</sup> If he has several branch establishments, suit may be brought at each place with respect to all causes of action arising out of the business of that particular branch.<sup>95</sup> The rule applies to all corporations and partnerships with a foreign "seat" establishing branches in Germany.

This special forum exists also with respect to all transactions arising from the cultivation of landed estates in Germany which are provided with living quarters and farm buildings.<sup>96</sup>

In order to be within the above rule the branch establishment of the commercial enterprise must have power to conclude business transactions independently of the principal office.<sup>97</sup>

Foreign insurance companies, before being authorized to do business in Germany, must agree to maintain a branch establishment there and to designate a general agent for Germany whose domicile must be in that country. All actions against the company arising from the insurance business in Germany may be brought at the place where such branch is located.<sup>98</sup> Insurance companies having their "seat" in one of the German states, but having a general agent in another, may be sued with reference to their insurance business in Germany in the state in which the general agent has his domicile.<sup>99</sup> Claims arising out of insurance contracts made in Germany by any insurance agent representing a German or a foreign insurance company may be brought at the place of business of such agent, or in the absence thereof, at his domicile.<sup>100</sup> In all these insurance cases stipulations excluding the jurisdiction of the courts mentioned are invalid.<sup>101</sup>

(3) *Forum Based Upon Ownership of Property or Presence of Object of Suit.* Section 23 of the Code of Civil Procedure provides:

"Pecuniary claims against a person not having a domicile in Germany may be brought at the place where he owns property or where the object directly affected by the suit is located. If

<sup>94</sup> CODE OF CIVIL PROCEDURE § 21, par. 1.

<sup>95</sup> RG, May 19, 1899, 44 RG 361; OLG Munich, May 14, 1900, 1 OLG 470.

<sup>96</sup> CODE OF CIVIL PROCEDURE § 21, par. 2.

<sup>97</sup> If the authority is limited to selling or to the transmission of offers, it is not a branch establishment within the meaning of § 21 of the Code of Civil Procedure. RG, Nov. 22, 1898, JW 1899, 2; OLG Hamburg, Apr. 24, 1909, 19 OLG 51.

<sup>98</sup> Sec. 86 (3), Law of May 12, 1901, RGBI 1901, 164.

<sup>99</sup> Sec. 115, par. 2, Law of May 12, 1901, RGBI 1901, 170-171.

<sup>100</sup> Sec. 48, Law of May 30, 1908, RGBI 1908, 273.

<sup>101</sup> See references *supra* notes 98-99; also § 89, Law of May 12, 1901, RGBI 1901, 165.

the property consists of a debt, the suit may be brought at the domicile of the debtor, or, if a thing is given as security for the debt, also at the situs of such security."

This section allows suit to be brought in Germany in two types of cases: (1) if the defendant owns property there; (2) if the object of the litigation is there. In both classes of cases, jurisdiction exists only if the defendant is not domiciled in Germany. The plaintiff's nationality<sup>102</sup> and domicile<sup>103</sup> are immaterial. In the case of corporations and partnerships, their "seats" must be outside of Germany.<sup>104</sup> The fact that they have one or more branch establishments in Germany does not prevent the operation of Section 23. The jurisdiction conferred by this section is concurrent with any other special forum that may exist. It exists with respect to pecuniary claims of every description, and without reference to the place or country in which they may have arisen.

The defendant is subject to suit in any place where property belonging to him may be located with respect to any pecuniary claim. It is not necessary that the property should possess any particular value,<sup>105</sup> or that it be subject to execution;<sup>106</sup> nor need it remain in the place during the period of the litigation. The jurisdiction exists although the property was left in the place accidentally.<sup>107</sup>

The property upon which jurisdiction is founded may consist of a pecuniary claim that the defendant may have against the plaintiff.<sup>108</sup>

If the defendant's property consists of a debt which a third party owes him, the suit referred to may be brought at the domicile of such party, and if such third party is a corporation or partnership, it may be brought at its "seat."<sup>109</sup> Such suits may be brought also at the situs of the property which is given as security for the debt.<sup>110</sup>

The second ground of jurisdiction referred to in Section 23 covers cases where the plaintiff sues for the delivery of property which is in the defendant's possession. It goes beyond the

<sup>102</sup> RG, Dec. 11, 1884, 14 RG 405; May 26, 1886, 16 RG 391.

<sup>103</sup> KG, March 7, 1914, Leipz. Z. 1916, 349.

<sup>104</sup> RG, May 21, 1891, 27 RG 421; OLG Hamburg, Dec. 13, 1916, 35 OLG 31.

<sup>105</sup> RG, Apr. 7, 1902, 51 RG 163; OLG Hamburg, May 27, 1907, 15 OLG 54.

<sup>106</sup> RG, May 26, 1886, 16 RG 391; Apr. 7, 1902, 51 RG 163.

<sup>107</sup> See RG, Apr. 29, 1881, 4 RG, 408, 410-411.

<sup>108</sup> RG, June 20, 1882, 7 RG 322.

<sup>109</sup> CODE OF CIVIL PROCEDURE § 23. For most purposes a debit is deemed to be at the place where the debtor is to pay.

<sup>110</sup> CODE OF CIVIL PROCEDURE § 23.

first part of the section in that the property need not belong to the defendant.<sup>111</sup> The object of the litigation need not be a "thing" within the meaning of Section 90 of the Civil Code, for it includes property rights of every description.<sup>112</sup> In these cases also jurisdiction exists with respect to all pecuniary claims, irrespective of the place or country of their origin.

(4) *Exclusive Forum at Situs of Immovable Property.* According to Section 24, paragraph 1, of the Code of Civil Procedure, the courts at the situs of immovable property have exclusive jurisdiction in actions based upon or involving ownership,<sup>113</sup> real charges,<sup>114</sup> actions to establish freedom from real charges, possessory actions, actions for the marking of boundaries, and partition suits. In the case of servitudes, perpetual charges on land, and real rights of preemption, exclusive jurisdiction exists at the situs of the servient tenement.<sup>115</sup>

The exclusive jurisdiction created by Section 24 is limited to immovable property.<sup>116</sup> In this respect the Code of Civil Procedure follows Germanic traditions, for the Roman forum *re sitae* referred both to movable and immovable property. Actions based upon "real" rights in movables can be brought at the domicile of the defendant, in accordance with Section 13 of the Code of Civil Procedure. They can be brought at the situs of the movable only if the defendant has no domicile in Germany.<sup>117</sup>

"Real" actions against registered vessels may be brought at their home port<sup>118</sup> or wherever the vessel may be found.<sup>119</sup>

(5) *Optional Forum at Situs of Immovable Property.* An optional forum at the situs of immovable property exists in three classes of cases:

(a) Certain actions specified in Section 25 of the Code of Civil Procedure and involving personal obligations may be brought in conjunction with a "real" action based on a hypothec, on a land or annuity charge, and in other instances.

(b) Personal claims directed against the owner or possessor

<sup>111</sup> 1 STEIN-JONAS, *op. cit. supra* note 26, at 98.

<sup>112</sup> RG, May 1, 1902, 51 RG 256.

<sup>113</sup> The term "ownership" is given a very wide meaning. It includes actions based on ownership or co-ownership, for the restoration of ownership, for the determination of the existence or non-existence of ownership, to enjoin interference with ownership, etc. RG, Oct. 19, 1895, 36 RG 232, 237. It does not include, however, the *hereditatis petitio*, even if the entire estate should consist of a single piece of realty. RG, Dec. 30, 1887, JW 1888, 217.

<sup>114</sup> Such as servitudes, rights of usufruct, real rights of pre-emption, hypothecs, land and annuity charges.

<sup>115</sup> CODE OF CIVIL PROCEDURE § 24, par. 2.

<sup>116</sup> What is immovable property is governed by the Civil Code.

<sup>117</sup> CODE OF CIVIL PROCEDURE § 23.

<sup>118</sup> 1 STEIN-JONAS, *op. cit. supra* note 26, at 99.

<sup>119</sup> OLG Hamburg, Dec. 15, 1900, 2 OLG 291.

as such, and which, after they come into existence, pass with such ownership or possession, may be brought at the situs of the immovable, independently of an action based on ownership.<sup>120</sup>

(c) All personal actions for injury to immovable property, or for compensation when it is taken by eminent domain, may be brought at the situs of such property. In the matter of eminent domain it may be provided locally that the courts of the situs shall have exclusive jurisdiction, and legislation to that effect is not infrequent in the different German states.<sup>121</sup>

(6) *Membership Forum*. Suits by an association (corporations, commercial partnerships, etc.) or its assignee<sup>122</sup> against its members as such, or by members against each other by reason of such membership,<sup>123</sup> may be brought at the "seat" of such association. The defendant need not be a member of the association at the time of suit; it is sufficient that the claim arose out of membership.<sup>124</sup>

(7) *Forum for Administration of Property*. Where the administration of property is involved, an action will lie between the principal and the agent on account of such management or administration at the place where the administration was carried on.<sup>125</sup> The jurisdiction continues after the termination of the administration. Such a forum is of importance in connection with general agencies,<sup>126</sup> or voluntary agencies (*negotiorum gestio*) and in connection with the administration of the wife's property by the husband, of the child's property by the parent, of a ward's property by his guardian, of a bankrupt estate by the trustee, and of the decedent's estate by the heir or executor.

The forum exists at the place constituting the center of administration, that is, where the books, etc. are kept. It is not necessary that any property should be there.<sup>127</sup>

(8) *Forum for Actions Relating to Inheritance*. Suits involving rights of inheritance, rights of heirs against the possessor of the inheritance, claims arising from bequests or other

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<sup>120</sup> CODE OF CIVIL PROCEDURE § 26. Examples: Action for production of a thing for inspection (CIVIL CODE § 809); action for permission to search for and remove a thing which was in the plaintiff's possession and is found on a piece of land in the possession of another (CIVIL CODE §§ 867, 1005); claims arising out of a lease so far as they bind the alienee, as owner (CIVIL CODE § 571); actions for reimbursement for the necessary outlay incurred upon property (CIVIL CODE §§ 994 *et seq.*).

<sup>121</sup> CODE OF CIVIL PROCEDURE § 26; 1 STEIN-JONAS, *op. cit. supra* note 26, at 105, n. 15.

<sup>122</sup> CODE OF CIVIL PROCEDURE § 22; RG, March 31, 1903, 54 RG 207.

<sup>123</sup> CODE OF CIVIL PROCEDURE § 22.

<sup>124</sup> RG, Jan. 29, 1881, 3 RG 385; Oct. 20, 1893, JW 1893, 535.

<sup>125</sup> CODE OF CIVIL PROCEDURE § 31.

<sup>126</sup> RG, Nov. 3, 1886, 20 RG 364.

<sup>127</sup> RG, March 29, 1894, JW 1894, 278; OLG Bamberg, Apr. 3, 1900, 1 OLG 159.

dispositions *causa mortis*, such as testamentary charges, contracts of inheritance, rights to the legitimate portion, and the division of the estate among the heirs, may be brought before the German court which had general jurisdiction over the decedent, that is to say, at his domicile, if his domicile was in Germany; or at his place of sojourn in Germany, if he had no domicile anywhere; or at his last domicile in Germany, if he had acquired no other domicile thereafter and his sojourn, if any, in Germany, was unknown to the plaintiff.<sup>128</sup> If the decedent had two domiciles in Germany, jurisdiction would exist at both places.<sup>129</sup>

Article 24 of the Introductory Law to the German Code provides that succession to the estate of a German, even if he had his domicile in a foreign country, is determined by German law. As it is not certain that this rule will be applied by foreign courts, jurisdiction is conferred upon the German courts. Section 27, paragraph 2, of the Code of Civil Procedure provides that suit may be brought at the decedent's last domicile in Germany, although he had a domicile at the time of his death in a foreign country. If the decedent never had a domicile in Germany, the suit may be brought at the capital of the German state of which he was a subject. If he was a German national, but not a subject of any particular German state, such suit may be brought at Berlin.

Suits for the recovery of debts owed by the decedent, of the burial expenses or the expenses of a receivership or bankruptcy proceedings with respect to the inheritance may also be brought in the above courts, provided there is only one heir and part of the property belonging to the estate is still within the jurisdiction of the court, or there are several heirs who are still severally liable for the debts of the estate.<sup>130</sup>

The *forum hereditatis* is not exclusive. Concurrent jurisdiction may exist elsewhere. Thus, if jurisdiction existed with respect to the decedent at a certain place because a contractual obligation assumed by him was to be performed there, or because a delictual act on his part had been committed there, such jurisdiction will exist also when suit is brought under principles of universal succession against his heir.<sup>131</sup>

(9) *Forum for Obligations.*

(a) *Contracts.*

(1) *In General.* In Roman law suit might be brought in the place where a contract was to be performed. This is

<sup>128</sup> CODE OF CIVIL PROCEDURE § 27.

<sup>129</sup> RG, June 6, 1895, 35 RG 418.

<sup>130</sup> CODE OF CIVIL PROCEDURE § 28; 1 STEIN-JONAS, *op. cit. supra* note 26, at 108.

<sup>131</sup> 2 HELLWIG, *LEHRBUCH DES DEUTSCHEN CIVILPROZESSRECHTS* (1907) 248.

still the law of Germany today.<sup>132</sup> What is meant by the law of the place of performance is governed by German law. According to Section 269 of the Civil Code, the intention of the parties controls in the first place. If the parties have not fixed the place of performance, it is to be inferred from the "circumstances," for example, from the nature of the obligation. If it cannot be inferred from the circumstances, it shall be at the place where the debtor has his domicile at the time the obligation arose. If the obligation arose in the conduct of the debtor's business operations, or if the debtor's business is located in another place, such place is substituted for the domicile. A defendant who has several domiciles or places of business may be sued at either at the plaintiff's election.<sup>133</sup>

Jurisdiction exists in the place where the defendant has agreed to perform. In the case of bilateral contracts, it is necessary, therefore, to determine whose obligation is involved in the suit. In some cases the answer is obvious; in others there is much difficulty. For example, in a contract of sale, if a buyer sues for specific performance or damages, the obligation of the seller is involved and suit would have to be brought at the place where his obligation was to be performed. So, if the seller sues for the acceptance of the goods or payment of the purchase price, his suit would have to be brought at the place where the buyer agreed to perform.<sup>134</sup> On the other hand, if the plaintiff asks for the rescission of the entire contract, it is held that jurisdiction exists at the place where he himself agreed to perform, for he obviously seeks release from his own obligation.<sup>135</sup> Where relief is asked on various grounds, some of which affect the defendant's obligation and others his own, suit must be brought at the place where the defendant agreed to perform.<sup>136</sup>

(2) *Bills and Notes.* The above rules apply where suit is brought upon a bill or note by the ordinary procedure. If the suit is by the special procedure applicable to bills and notes, it may be brought also at the place of payment indicated in the instrument, which may not be the same as the place of performance of the defendant's obligation.<sup>137</sup>

(3) *Contracts Made at a Fair.* An exception to the jurisdiction of the place of performance has been created in the interest of the merchants at Leipzig, for suits arising out of

<sup>132</sup> CODE OF CIVIL PROCEDURE § 29.

<sup>133</sup> RG, Nov. 26, 1897, JW 1898, 3; Sächs. OLG, July 13, 1897, 19 Sächs. Ann. 447.

<sup>134</sup> RG, May 4, 1883, 9 RG 350; March 8, 1907, 65 RG 329; OLG Hamburg, Apr. 14, 1919, 40 OLG 345.

<sup>135</sup> RG, Nov. 6, 1903, 56 RG 138.

<sup>136</sup> RG, June 21, 1902, 52 RG 54; OLG Hamburg, Nov. 8, 1919, 40 OLG 346.

<sup>137</sup> CODE OF CIVIL PROCEDURE § 603; 2 STEIN-JONAS, *op. cit. supra* note 26, at 255.

commercial transactions concluded at the Leipzig Fair may be brought there, provided the defendant is there at the time of the commencement of the suit, or some agent authorized to represent him in litigation.<sup>138</sup> This is the only instance in which jurisdiction is predicated upon the place of contracting. If the contract is to be performed at Leipzig, jurisdiction at that place would exist in accordance with the ordinary rule applicable to contracts.

(b) *Torts*. Suit may be brought at the place where a tort is committed.<sup>139</sup> The question what is meant by a tort for purposes of jurisdiction is governed by German law.<sup>140</sup> German law regards a tort as committed in every state in which an essential part of the facts constituting the cause of action took place, and not exclusively in the place where the injury occurred; and jurisdiction exists at each of those places.<sup>141</sup> Thus, if a person uses a newspaper to further fraudulent ends, suit may be brought in every place in which some person has been injured by acting upon such representation.<sup>142</sup> Again, a person libelled in a newspaper may bring suit in any place where the paper was read. Recovery may be had in any of these places for the entire damage.<sup>143</sup>

Jurisdiction exists if the plaintiff proves that an essential part of the facts constituting the alleged offense took place within the jurisdiction of the court; he need not show that the facts actually constituted a tort for which the defendant is responsible, for this goes to the merits of the case, instead of to the jurisdiction of courts.<sup>144</sup>

If the same facts constitute both a tort and a breach of contract, suit may be brought in the place where the wrong was committed, if a tort action is brought, and at the place where the contract was to be performed, if a contract action is brought.<sup>145</sup> The latter action cannot be combined, however, with a tort action, nor can an action for quasi-contracts be combined with a tort action, if the facts constituted both a tort and a quasi-contract.<sup>146</sup>

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<sup>138</sup> CODE OF CIVIL PROCEDURE § 30.

<sup>139</sup> *Ibid.* § 32.

<sup>140</sup> RG, Nov. 14, 1912, 68 SA 163.

<sup>141</sup> RG, May 31, 1902, 57 SA 331; Oct. 18, 1909, 72 RG 41.

<sup>142</sup> RG, May 11, 1891, 27 RG 418.

<sup>143</sup> RG, Oct. 18, 1909, 72 RG 41, a decision by the United Chambers of the Imperial Court, departing from a decision by the 6th Chamber, of Apr. 10, 1906, 60 RG 363, in which recovery had been limited in every place other than that of the original publication to the damage suffered within the territory of the jurisdiction of the court in which suit was brought.

<sup>144</sup> RG, May 23, 1887, JW 1887, 311; June 24, 1886, JW 1886, 265.

<sup>145</sup> OLG Stuttgart, Nov. 29, 1907, 63 SA 207; OLG Jena. Feb. 25, 1908, 65 SA 373.

<sup>146</sup> RG, Feb. 9, 1891, 27 RG 385.

The jurisdiction conferred by Section 32 of the Code of Civil Procedure includes also quasi-delicts, that is, cases where the defendant is made responsible for damage caused by him without fault.<sup>147</sup>

(10) *Concurrent Fora.* Except where the law regards a particular forum as exclusive, as for example, in Section 24 of the Code of Civil Procedure, the plaintiff may elect between concurrent fora that are open to him.<sup>148</sup> In practically all cases, therefore, in which a special forum exists, suit may be brought also at the defendant's domicile (the general forum). In many instances also several special fora will co-exist, and here again the plaintiff may choose between them.

(11) *Forum by Agreement.* The above rules relating to jurisdiction may be affected by the agreement of the parties, for in all cases involving a pecuniary claim, except those for which the law has provided an exclusive forum, the parties may confer jurisdiction upon any trial court which, without such consent, would have no jurisdiction. The agreement may be entered into before a dispute has arisen or afterwards. Such contract has been regarded as relating to procedure and as governed therefore by German law, though it was made in a foreign country.<sup>149</sup>

The agreement may be expressed or implied, and it will be implied on the part of the defendant if he proceeds to the merits of the case without objecting to the jurisdiction of the court.<sup>150</sup> In Germany appearance as such in a case does not constitute a submission to the jurisdiction of the court.<sup>151</sup>

Parties may agree that a foreign court shall have jurisdiction, and they have the power to confer exclusive jurisdiction upon a particular court, German<sup>152</sup> or foreign.<sup>153</sup> The court upon which

<sup>147</sup> Sec. 20, Auto Law, of May 3, 1909, RGBI 1909, 437; § 1, Law of June 7, 1871, relating to Liability of Railroads, RGBI 1871, 207; § 30 of the Air Law, of Aug. 1, 1922, RGBI 1922 I, 681. Section 24 of the Law against Unfair Competition, of June 7, 1909, RGBI 499, confers exclusive jurisdiction upon the courts of the defendant's domicile, and in the absence of a domicile, upon the courts at his place of business. It has been held, however, that if the acts complained of constituted at the same time a delict within the definition of the Civil Code, a suit for such delict might be brought where the delict was committed. KG, March 12, 1913, 27 OLG 288; Hans. OLG, Apr. 14, 1915, JW 1915, 731. *Contra*: Hans. OLG, Feb. 23, 1915, HGZ 1915, 132.

<sup>148</sup> CODE OF CIVIL PROCEDURE § 35.

<sup>149</sup> OLG Stettin, Apr. 3, 1903, 7 OLG 274; OLG Dresden, May 30, 1904, 9 OLG 51.

<sup>150</sup> CODE OF CIVIL PROCEDURE § 39.

<sup>151</sup> If the defendant does not appear, the court must determine *ex officio* whether it has jurisdiction. RG, May 26, 1880, 1 RG 438.

<sup>152</sup> RG, Feb. 22, 1894, 49 SA 450; Dec. 13, 1902, JW 1903, 45; May 2, 1905, 61 SA 169.

<sup>153</sup> OLG Colmar, March 31, 1903, 6 OLG 384; OLG Dresden, May 30, 1904, 9 OLG 51. It has been held that exclusive jurisdiction might be

such exclusive jurisdiction is conferred may be one that was competent or incompetent by the ordinary rules relating to jurisdiction.<sup>154</sup> Whether or not the parties intended to create an exclusive forum, and whether they intended to establish it with respect to both of the contracting parties or only as to one of them is, of course, a question of construction of the particular contract.<sup>155</sup>

The following limitations exist with respect to contracts conferring jurisdiction:

(1) To be valid, a contract conferring jurisdiction must have reference to litigation arising out of particular transactions. Parties cannot stipulate that a certain court shall have jurisdiction over all disputes that may arise between them.<sup>156</sup> Nor can they validly agree that future tort claims shall be brought before a particular court.<sup>157</sup>

(2) A stipulation conferring jurisdiction is invalid if it refers to other than pecuniary claims.<sup>158</sup>

(3) A stipulation cannot confer jurisdiction with regard to matters for which an exclusive forum has been provided by law.<sup>159</sup> Such an exclusive forum has been created by Section 24 of the Code of Civil Procedure with respect to certain kinds of actions affecting immovable property. Exclusive fora have been created also by special laws. Thus, claims for salvage must be brought before the court of the district within whose jurisdiction the salvage operations took place.<sup>160</sup> Disputed claims in bankruptcy proceedings must be brought at the place where the

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conferred upon a foreign court notwithstanding the fact that the judgments of such country are not recognized nor enforced in Germany, at least if the contract was between a German and a foreigner, so that its enforcement abroad might have been within the contemplation of the parties. RG, May 16, 1926, JW 1926, 1336; but see KG, Feb. 6, 1926, JW 1926, 1353.

<sup>154</sup> RG, Jan. 20, 1890, 45 SA 464; Sächs. OLG, July 8, 1896, 19 Sächs. Ann. 62.

<sup>155</sup> OLG Stettin, Apr. 3, 1903, 7 OLG 274; OLG Dresden, May 30, 1904, 9 OLG 51. A stipulation that the courts of X shall have jurisdiction does not raise a presumption that they are to have exclusive jurisdiction. RG, Oct. 28, 1911, JW 1912, 79. But where the contract provided that "the place of performance for all rights and obligations arising from this contract shall be in X, and the courts of X shall have jurisdiction," a presumption was raised that the parties intended to create an exclusive forum, especially where such place was in Germany. RG, Jan. 7, 1914, Recht 1914, No. 1439.

<sup>156</sup> CODE OF CIVIL PROCEDURE § 40, par. 1; OLG Stettin, Apr. 3, 1903, 7 OLG 274.

<sup>157</sup> OLG Bamberg, June 16, 1899, affirmed by Bayr. OLG, March 20, 1900, 1 OLG 239.

<sup>158</sup> CODE OF CIVIL PROCEDURE § 40, par. 2.

<sup>159</sup> *Ibid.* § 40, par. 2.

<sup>160</sup> Sec. 39, Law of May 17, 1874, RGBI 1874, 73, 81; OLG Celle, May 31, 1906, 13 OLG 54.

bankruptcy court sits.<sup>161</sup> The Law against Unfair Competition, of June 7, 1909, creates an exclusive forum for actions based on that act. Such actions must be brought at the defendant's place of business, and if he has none in Germany, at his domicile. If he has no place of business nor a domicile in Germany, it must be brought at the place where he sojourned. If his sojourn in Germany is not known, it must be brought where the act was done.<sup>162</sup>

(4) In insurance matters also the power to affect the jurisdiction of certain courts is limited by law. Foreign insurance companies must have a place of business in Germany at which suits may be brought against the company, and jurisdiction there cannot be excluded by contract.<sup>163</sup> Any insurance company having a seat in one of the German states, but a general agent in another, may be sued as regards all insurance business done in Germany at the domicile of the general agent, and jurisdiction there cannot be excluded by contract.<sup>164</sup> According to Section 48 of the law of May 30, 1908, suit may be brought upon insurance policies negotiated by an insurance agent in Germany at the place of business of such agent, or, in the absence of such a place, at his domicile. This jurisdiction also cannot be excluded by contract.<sup>165</sup>

#### LIS PENDENS

The pendency of a suit in a foreign country will be a bar to a suit in Germany upon the same cause of action, if the judgments of such foreign country are entitled to recognition in Germany, but not otherwise.<sup>166</sup>

#### FOREIGN JUDGMENTS

The execution of foreign judgments in Germany can take place only by means of a proceeding for execution.<sup>167</sup> Section 723 of the Code of Civil Procedure provides that an order authorizing the execution of a foreign judgment shall be made

<sup>161</sup> BANKRUPTCY ACT § 146, par. 2.

<sup>162</sup> LAW AGAINST UNFAIR COMPETITION § 24; RGBI 1909, 499.

<sup>163</sup> Sec. 89, Law of May 12, 1901, RGBI 1901, 165.

<sup>164</sup> Sec. 115, par. 2, Law of May 12, 1901, RGBI 1901, 171.

<sup>165</sup> RGBI 1908, 273.

<sup>166</sup> RG, Apr. 13, 1901, 49 RG 340; Oct. 28, 1911, JW 1912, 79; Sept. 18, 1925, JW 1926, 374.

<sup>167</sup> Code of Civil Procedure § 722. A foreign judgment does not merge the original cause of action. A new suit may be brought in Germany, however, only if the creditor is deemed to have acted reasonably in bringing the second suit, for example, because the foreign judgment was not subject to execution in Germany. RG, June 30, 1886, 16 RG 427, 434-435.

If something else than execution is applied for, for example, the registration of a foreign judgment on some public register, a proceeding for execution is not necessary. RG, May 18, 1916, 88 RG. 244.

without going into the merits of the foreign judgment.<sup>168</sup> Matters that arose subsequent to the rendition of the foreign judgment may be taken into consideration.<sup>169</sup> This includes set-offs that arose subsequently;<sup>170</sup> but if the set-off arose prior to the rendition of the judgment, and such set-off would have satisfied the plaintiff's claim according to such foreign law, it cannot be set up in the execution proceedings in Germany.<sup>171</sup>

An order authorizing the execution of a foreign judgment can be made only if such judgment is unconditional and final, and not subject to appeal or review. The fact that execution may lie upon it before such time in the foreign country is immaterial.<sup>172</sup> Moreover, it must be a judgment of a civil or commercial court, for other judgments are not within the meaning of the provisions of the German Code of Civil Procedure relating to the recognition and enforcement of foreign judgments.<sup>173</sup>

A foreign judgment cannot be declared subject to execution in Germany if it violates any of the provisions contained in Section 328 of the Code of Civil Procedure.<sup>174</sup> This section is couched in negative language and lays down five conditions without compliance with which the foreign judgment will not be recognized. It is generally held that if these conditions are satisfied the judgment will be recognized. The conditions specified are the following:

(1) The foreign judgment will not be recognized if the courts of the foreign country in which the court sat were incompetent according to German law.<sup>175</sup>

Foreign judgments will be recognized and enforced in Germany only if rendered by a court which had jurisdiction from the standpoint of the German law, *i.e.*, Sections 12 and following of the Code of Civil Procedure. Thus, if by reason of those rules the court of some other country has jurisdiction, no effect will be given to the foreign judgment.<sup>176</sup> On the other hand, if the courts of the state where the judgment was rendered had jurisdiction in the eyes of the German law, the judgment cannot be attacked on the ground that there was no jurisdiction from the point of view of the foreign law, either in the courts of the

<sup>168</sup> They cannot inquire, therefore, whether the foreign court had jurisdiction from the standpoint of the foreign local law. RG, Jan. 19, 1911, 75 RG 147.

<sup>169</sup> RG, Feb. 5, 1885, 13 RG 347.

<sup>170</sup> RG, May 24, 1886, JW 1886, 195.

<sup>171</sup> OLG Munich, March 8, 1922, 43 OLG 142.

<sup>172</sup> CODE OF CIVIL PROCEDURE § 723; 2 STEIN-JONAS, *op. cit. supra* note 26, at 479-480.

<sup>173</sup> *Ibid.* 483.

<sup>174</sup> CODE OF CIVIL PROCEDURE § 723.

<sup>175</sup> *Ibid.* § 328-1.

<sup>176</sup> RG, Feb. 5, 1906, JW 1906, 167; Jan. 7, 1914, Leipz. Z. 1914, 774; Dec. 16, 1920, 76 SA 169.

country as a whole, or in the particular court rendering the judgment.<sup>177</sup>

Under the present German law it is sufficient that the courts of the country in which the judgment was rendered had jurisdiction, in accordance with the provisions of the German Code of Civil Procedure, although the particular court rendering the judgment was not the competent court.<sup>178</sup> For example, it is sufficient that the place of performance of a contractual obligation was in the foreign country, though not at the place where the court sat rendering the judgment. Again, if a defendant was not domiciled in the foreign country but possessed property there, jurisdiction would exist although the suit was not instituted at the situs of such property.

It is sufficient that the courts of the foreign country had jurisdiction at the time of the commencement of the suit.<sup>179</sup> Whether such judgment will be entitled to enforcement if such jurisdiction did not exist at that time, but was established prior to the proceedings in Germany for recognition or enforcement, does not appear to be settled.<sup>180</sup>

(2) The foreign judgment will not be recognized or enforced in Germany against a citizen of Germany if he did not appear in and plead to the action and was not served personally or through German judicial aid.<sup>181</sup>

This provision regarding notice exists only in favor of defendants who are German citizens at the time of the commencement of the suit, but exists without reference to the fact whether or not the defendant was domiciled in the foreign country.<sup>182</sup> The special protection which a German defendant thus enjoys, in order that he may have a chance to defend, is lost if he appears and pleads, although such plea does not relate to the merits, but perhaps only to the jurisdiction of the court.<sup>183</sup>

The service required by the Code varies in accordance with the place of service. If the service took place in the state where the judgment was rendered, it must be "personal." In the case of persons who are under a disability, such service may be made upon their legal representatives.<sup>184</sup> Such representative, however, must be one that is recognized as proper from the standpoint of German law.<sup>185</sup> Service upon a person having a general

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<sup>177</sup> RG, June 12, 1900, 45 Gruchot 1123; Feb. 20, 1913, JW 1913, 552.

<sup>178</sup> RG, March 21, 1902, 51 RG 135; March 8, 1907, JW 1907, 265; Jan. 19, 1911, 75 RG 147.

<sup>179</sup> KG, June 22, 1906, 13 OLG 182.

<sup>180</sup> Left open in KG, June 22, 1906, 13 OLG 182.

<sup>181</sup> CODE OF CIVIL PROCEDURE § 323-2.

<sup>182</sup> RG, June 30, 1886, 16 RG 427.

<sup>183</sup> RG, Apr. 21, 1891, JW 1891, 272.

<sup>184</sup> CODE OF CIVIL PROCEDURE § 171.

<sup>185</sup> Where the foreign court appointed a curator on account of the de-

power of attorney or upon a "procurist" with respect to disputes arising out of a mercantile business is the equivalent of "personal service" upon the defendant.<sup>186</sup> Service in a state other than the one in which the judgment was rendered, including Germany, will be sufficient only if it was made with German judicial aid. This means that if the defendant was in Germany, service was made in the manner specified in Sections 160 and following of the Code of Civil Procedure, and if he was in a foreign country, that it was made through the intervention of a German consulate, in accordance with Sections 199 and following of the Code of Civil Procedure, or the provisions of the Hague Convention relating to Civil Procedure of July 17, 1905.<sup>187</sup> In these cases personal service is not required.

(3) A foreign judgment will not be recognized or enforced if it deviated, to the prejudice of a party who is a German citizen, from the provisions of Article 13, paragraphs 1 and 3, and Articles 17, 18, and 22 of the Introductory Law to the German Civil Code, or from that part of Article 27 of the same law relating to Article 13, paragraph 1; or if it deviated from Article 13, paragraph 2, to the prejudice of the wife of a foreigner who has been declared dead in a case falling within Article 9, paragraph 3.<sup>188</sup> These references embrace disputes concerning marriage, divorce, legitimacy, or the legitimation of illegitimate children, and adoption. Foreign judgments will be denied recognition if the foreign court departed from the rules of the conflict of laws contained in the articles mentioned to the prejudice of a party who is a German. The last provision is for the protection of a woman who was a German prior to her first marriage to a foreigner. If she married again, in conformity with German law, after her husband had been declared dead in Germany because of absence, and such marriage was pronounced invalid by a foreign court, the judgment will not be recognized.

(4) A foreign judgment will not be recognized or enforced in Germany if such recognition or enforcement would be *contra bonos mores*, or opposed to the purpose of a German law.<sup>189</sup>

(5) A foreign judgment will not be recognized or enforced if reciprocity is not guaranteed. An exception is made if the judgment is not a pecuniary one, and the German courts were without jurisdiction in the matter.<sup>190</sup>

Reciprocity must exist at the time recognition or enforcement

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defendant's absence, and service was made upon such representative, the judgment was not recognized. OLG Breslau, Oct. 21, 1908, 17 OLG 324.

<sup>186</sup> CODE OF CIVIL PROCEDURE § 173.

<sup>187</sup> RGBl 1909, 409, 430.

<sup>188</sup> CODE OF CIVIL PROCEDURE § 328-3.

<sup>189</sup> *Ibid.* § 328-4.

<sup>190</sup> *Ibid.* § 328-5.

of the foreign judgment is sought in Germany.<sup>191</sup> It must exist in actual practice and not merely in the codes or statutes. Reciprocity means that a German judgment will be recognized and enforced in the foreign country under essentially the same conditions as those prescribed by Section 328 of the German Code of Civil Procedure for the recognition of foreign judgments.<sup>192</sup> It is not sufficient that the particular judgment in question would be recognized or enforced in the foreign country, if German judgments in general are examined to an extent not admitted by Section 328.<sup>193</sup> Thus, a foreign judgment will not be recognized or enforced if the courts of the foreign state are authorized to examine the merits of German judgments. A narrow interpretation of the term "reciprocity" would preclude the enforcement of any foreign judgment, and this is practically the situation in Germany today in the light of the decisions of the Imperial Court. Reciprocity is actually held to exist only with respect to a few of the smaller countries, such as Czechoslovakia, Denmark, Egypt, and Spain. As between Austria and Germany the matter has been regulated by treaty.

Under the present Code of Civil Procedure three cases have arisen involving judgments of the United States. Two of these were divorce proceedings. In one the divorce was granted in New York to a German couple domiciled there. The Kammergericht at Berlin declined to recognize the decree because of lack of reciprocity.<sup>194</sup> In the other, a German wife left her husband in Germany, got a divorce in Illinois, and married again in Illinois. The husband, who remained domiciled in Germany, thereupon brought suit in Germany, alleging as a ground for divorce his wife's adultery with her second husband. It was held again, this time by the Oberlandesgericht at Hamburg, that the divorce could not be recognized, but the petition for divorce was denied on the ground that from the standpoint of the German law a person is not guilty of adultery if he has sexual relations with a person whom he bona fide believes to be his wife.<sup>195</sup>

The enforcement of judgments for the payment of money was sought in cases decided by the Imperial Court, on March 26, 1909.<sup>196</sup> The German insurance companies having withdrawn from California after the great fire in April, 1906, judgments by default against the defendant company were rendered in California in January and May, 1907. On March 11, 1907, Section 1915 of the California Code of Civil Procedure was amended to read as follows:

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<sup>191</sup> RG, June 15, 1898, 41 RG 424; March 26, 1909, 70 RG 434.

<sup>192</sup> RG, March 26, 1909, 70 RG 434; March 11, 1913, 82 RG 29.

<sup>193</sup> RG, Dec. 10, 1926, 115 RG 103.

<sup>194</sup> KG, Feb. 16, 1909, 19 OLG 106.

<sup>195</sup> OLG Hamburg, May 27, 1914, 29 OLG 181.

<sup>196</sup> 70 RG 434.

"A final judgment of any other tribunal of a foreign country (other than an admiralty court mentioned in section 1914) having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state."

The section amended had read as follows:

"The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment is as follows: . . . 2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or a clear mistake of law or fact."

Suit having been brought in Germany, enforcement of the California judgments was denied by the Imperial Court on the ground that reciprocity was not guaranteed. The conclusions of the Imperial Court, but not its reasoning, has met quite generally with approval, because the California Code of Civil Procedure, prior to its amendment in 1907, clearly allowed defences in suits upon foreign judgments beyond those recognized by Section 328 of the German Code of Civil Procedure. The circumstance that at the time enforcement was sought in Germany the law of California had been changed so as to give greater effect to foreign judgments afforded in the estimation of German writers *no guaranty* of reciprocity, in view of the fact that the legislation was enacted to meet a special occasion and, it was assumed, for a temporary purpose. The Imperial Court, however, did not base its decision upon that consideration. It held that reciprocity did not exist in the first place because the California courts before enforcing a German judgment would inquire into the jurisdiction of the particular German court, both with respect to the person and the subject matter. This the Imperial Court regarded as going substantially beyond the provisions of Section 328 of the German Code of Civil Procedure. As a second reason it assigned the fact that the defense of fraud might be interposed in a court of equity in California which would allow a re-examination of the foreign judgment, contrary to the fundamental theory of the German law.

#### FOREIGN ARBITRAL AWARDS

The status of foreign arbitral awards in Germany is not clearly established. The Code of Civil Procedure of 1924 has made certain changes in the former provisions relating to arbitral awards, but neither the former code nor the present one deals specifically with foreign arbitral awards. In view of the im-

portance of the subject today, the failure to deal adequately with foreign awards is to be regretted.<sup>197</sup> Prior to 1924 valid foreign awards were subject to execution in Germany after they had been declared executory by a German court, and such execution was granted although no reciprocity was proved to exist between the two countries. In that respect there was a difference between the enforcement of foreign judgments and foreign arbitral awards.<sup>198</sup> In order to be declared executory, the foreign award had to satisfy Section 1039 of the German Code of Civil Procedure, which contained the following conditions: (1) the award must be dated and signed by the arbitrators; (2) an original copy of the award, signed by the arbitrator, must be delivered to the parties in the mode specified by the Code of Civil Procedure; and (3) the award must be deposited with a competent German court together with proof of its due delivery to the parties.<sup>199</sup> If any of these provisions were not complied with, the suit to have the foreign award declared subject to execution in Germany would be dismissed, but an action might be brought nevertheless for the performance of the award.<sup>200</sup> Such a suit presupposed, of course, that an award valid according to the foreign law existed.<sup>201</sup>

A valid foreign contract for arbitration would be a defense to an action on the contract in Germany, irrespective of the fact whether the contract was entered into in Germany or abroad.<sup>202</sup>

In a decision of February 22, 1927,<sup>203</sup> the Imperial Court held that no suit could be brought in Germany to set aside a foreign award, jurisdiction to do so being limited to the courts of the foreign state. As a result of this decision, in conjunction with arguments drawn from changes made in 1924 in the provisions of the Code of Civil Procedure relating to arbitration, Jonas, the present editor of the leading commentary on the Code of Civil Procedure, concludes that the only remedy available today for the enforcement of a valid foreign award is an action for performance, and that the former remedy to have the judgment declared subject to execution in Germany is abolished.<sup>204</sup> Ac-

<sup>197</sup> A convention for the enforcement of foreign arbitral awards, of Sept. 26, 1927, elaborated under the auspices of the League of Nations and signed by Germany and some other countries, is not yet in effect. 2 STEIN-JONAS, *op. cit. supra* note 26, at 1079.

<sup>198</sup> *Ibid.* 1151.

<sup>199</sup> RG, Nov. 5, 1881, 5 RG 397; Dec. 22, 1911, 67 SA 426.

<sup>200</sup> ROHG, Sept. 1, 1873, 10 ROHG 391; RG, Dec. 29, 1888, JW 1889, 169; Dec. 10, 1892, 30 RG 368; Sept. 28, 1895, 6 Niemeyer 55; Apr. 30, 1901, JW 1901, 424; Dec. 22, 1911, 67 SA 426.

<sup>201</sup> RG, Apr. 30, 1901, JW 1901, 424.

<sup>202</sup> CODE OF CIVIL PROCEDURE § 274, No. 3; RG, Apr. 30, 1901, JW 1901, 424.

<sup>203</sup> 116 RG 193. *Accord*: RG, Feb. 7, 1928, 39 Niemeyer 258.

<sup>204</sup> 2 STEIN-JONAS, *op. cit. supra* note 26, at 1153; Jonas, *Anerkennung*

According to this learned writer, effect in Germany will be denied to a valid foreign award if any of the grounds mentioned in Section 1041 of the Code of Civil Procedure exist. These grounds are the following: (1) the procedure was "improper"; (2) the award ordered a party to do something that was illegal; (3) the party was not properly represented in the proceeding, unless it ratified such action expressly or by implication; (4) the party did not have a proper hearing in the proceeding; (5) no reasons for the decision were given in the award; (6) conditions exist according to which an action for restitution will lie according to numbers 1-6 of Section 580 of the Code of Civil Procedure. The grounds mentioned in (4) and (5) above may be waived by the parties.

The foreign award may be invalid if it does not conform with the agreement for arbitration. Furthermore, if the contract is made in one state and the award in another, a question regarding the law governing the validity of the agreement may arise. According to Jonas, the ordinary rules governing contracts will not control, as an agreement for arbitration is merely a procedural condition for the rendition of the award. He contends that the law of the state governing the award, in accordance with the agreement for arbitration, should determine the validity and provisions of the contract for arbitration.<sup>205</sup> If the agreement calls for arbitration by some permanent body of arbitrators in a given place, the law of such state should control in the estimation of the author referred to.<sup>206</sup> Thus, if the law of that state does not require an agreement for arbitration to be in writing, it will be valid, notwithstanding the fact that the law of the state where the agreement was made would regard oral contracts for arbitration as null and void.

Where the agreement calls for arbitration by private arbitrators, and the place where the arbitration is to take place and the procedures to be followed are indicated, the law of the place of the award will again determine whether there was a valid agreement for arbitration, or whether the award was within the terms of the agreement. Our author supposes the case of an Englishman and a German, both living in Germany, entering into a contract for arbitration there, and agreeing that the English procedure shall be followed by the arbitrators. He concludes that the award, although made in Germany, would under such circumstances be a foreign award, and a deposit of the award with a German court would not alter this fact, so as to convert it into a German award.<sup>207</sup>

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*und Vollstreckung ausländischer Schiedssprüche* (1927) JW 1297; see also RG, Jan. 28, 1927, 116 RG 76.

<sup>205</sup> 2 STEIN-JONAS, *op. cit. supra* note 26, at 1085.

<sup>206</sup> Jonas, *op. cit. supra* note 204, at 1298.

<sup>207</sup> *Ibid.*

If, contrary to the ordinary rule, an agreement for arbitration should not specify the law in accordance with which the award shall be made, much difficulty may be experienced in ascertaining by what law the validity of the award shall be determined.<sup>203</sup>

The existence of a valid foreign award being conceded, it will be enforced, as stated above, if the requirements of Section 1041 are met. The first requirement—that the arbitral procedure must not have been improper—is to be tested with reference to the foreign law governing the award,<sup>209</sup> whereas the rest are governed by the local German law.<sup>210</sup> Compliance with the requirements set forth in Section 1041, numbers 4-5, is not necessary in the case of a foreign award, for these will be deemed waived by the parties, as authorized by the section, from their submission to the foreign arbitration.<sup>211</sup>

If the foreign award is entitled to recognition, any defense going to the merits that could have been interposed in the foreign arbitration proceeding will be cut off in Germany. Any defense that may have arisen subsequently to the award may and must be interposed in the German proceeding for the performance of the award.<sup>212</sup>

#### APPLICATION OF FOREIGN LAW

The German courts are under a duty to take judicial notice of the law of foreign countries.<sup>213</sup> They may ask the parties to assist them, but cannot impose upon them the burden of proof.<sup>214</sup> If the parties are unable to prove the foreign law, the courts are not relieved of the duty to ascertain it.<sup>215</sup> To this end they may use all means at their disposal. The judge may write to a German consul in the foreign country regarding such law; he may ask for a formal opinion by a person learned in that law; and if he can read the foreign law himself, he need go no further.

The judge has to apply *ex officio* the foreign law with reference to which the rights of the parties are to be determined under German law, even if neither of the parties relies upon it.<sup>216</sup> Failure to consult the laws of the proper foreign country in such case will cause reversal by the Imperial court;<sup>217</sup> but not, if he

<sup>203</sup> Jonas, *loc. cit. supra* note 204, at 1298.

<sup>209</sup> 2 STEIN-JONAS, *op. cit. supra* note 26, at 1155; RG, Jan. 28, 1927, 116 RG 76.

<sup>210</sup> 2 STEIN-JONAS, *op. cit. supra* note 26, at 1155.

<sup>211</sup> *Ibid.* 1153.

<sup>212</sup> *Ibid.* 1155.

<sup>213</sup> CODE OF CIVIL PROCEDURE § 293.

<sup>214</sup> RG, May 15, 1899, 43 Gruchot 1227.

<sup>215</sup> RG, March 23, 1897, 39 RG 371, 376.

<sup>216</sup> RG, Jan. 30, 1889, 23 RG 31.

<sup>217</sup> RG, March 4, 1924, Leipz. Z. 1924, 590.

has tried to apply the law of the proper foreign country but made a mistake regarding its provisions.<sup>218</sup>

If the judge is unable to find out what the foreign law is, the party relying upon such law will lose, according to some decisions; <sup>219</sup> other courts have presumed that the foreign law was identical with the law of the forum.<sup>220</sup>

#### PROCEDURE

Matters of procedure are controlled in the nature of things by the law of the forum. Justice can be administered only through the local machinery. It should be noticed, however, that the German courts limit the term "procedure" more strictly than do Anglo-American courts. Thus it is held that the burden of proof is a matter of substantive law.<sup>221</sup> Again, it is well settled today that the statute of limitations is not a procedural device, but is governed by the law controlling the substantive rights of the parties.<sup>222</sup> Whether a defendant has a right of set-off against the plaintiff has been held by one court to be governed by the law of the debtor's domicile,<sup>223</sup> and by another, by the law of the forum.<sup>224</sup>

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<sup>218</sup> CODE OF CIVIL PROCEDURE §§ 549, 562; RG, Feb. 25, 1904, 57 RG 142; May 18, 1906, 63 RG 318; Nov. 27, 1911, 78 RG 48.

<sup>219</sup> ROHG, Apr. 28, 1879, 25 ROHG 53; OLG Braunschweig, Feb. 18, 1895, 51 SA 129; see also RG May 25, 1888, 21 RG 175, 177.

<sup>220</sup> ROHG, Feb. 14, 1871, 2 ROHG 27; RG, June 22, JW 1900, 589; Nov. 22, 1901, JW 1902, 36.

<sup>221</sup> RG, Apr. 17, 1882, 6 RG 412.

<sup>222</sup> ROHG, Oct. 17, 1874, 14 ROHG 258; RG, July 8, 1882, 9 RG, 225; July 5, 1910, 74 RG 171; Nov. 21, 1910, 24 Niemeyer 324.

The older cases were divided. In favor of the *lex fori*: OAG Celle, Feb. 6, 1855, 9 SA No. 246; OAG Rostock, May 16, 1859, 16 SA No. 90; OAG Jena, March 6, 1863, 16 SA No. 184. In actions for breach of contract the statute of limitations of the place of performance of the particular obligation will control, even if the courts of such state regard the statute as procedural. RG, Jan. 4, 1882, 7 RG 21.

<sup>223</sup> OLG Hamburg, Nov. 21, 1913, Leipz. Z. 1914, 505.

<sup>224</sup> OLG Cassel, Nov. 11, 1910, 23 OLG 14.